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ORIGINAL

EX-1078-03 LATE FILED

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VIA HAND DELIVERY

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APR - 3 2003

April 3, 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Marlene Dortch  
Secretary  
Federal Communications Commission  
The Portals  
TW-A325  
445 12<sup>th</sup> Street, S W  
Washington, D.C. 20554

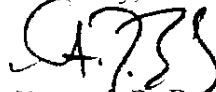
Re Failure of Filed Notice of *Ex Parte* Presentation to Appear on ECFS  
CC Docket No. 01-337, WC Docket No. 02-33, CC Docket Nos. 98-10, 95-20

Dear Ms. Dortch:

On March 24, 2003, the attached Notice of Written *Ex Parte* Presentation was filed with the Commission's Office of the Secretary. The filing was appropriately date-stamped "received." The document has not yet appeared on the Commission's Electronic Comment Filing System ("ECFS").

For your convenience, twelve copies of the filing are enclosed for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me

Sincerely,



Kenneth R. Boley  
Counsel for EarthLink, Inc.

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March 24, 2003

**EX PARTE**

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Secretary  
Federal Communications Commission  
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**MAR 24 2003**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

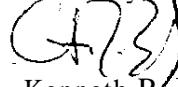
Re Notice of Written *Ex Parte* Presentation  
CC Docket Nos 02-33 98-10. 95-20. 01-337

Dear Ms Donch

On March 24, 2003, the attached letter was delivered to Chairman Powell. The purpose of the letter is to explain the legal obstacles to using "regulatory parity" as a basis for decision in the *Wireline Broadband* proceeding.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, eight copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Sincerely,



Kenneth R. Boley

Counsel for EanhLink, Inc

CC	Chairman Michael Powell	Jordan Goldstein
	Commissioner Kathleen Abernathy	Daniel Gonzalez
	Commissioner Michael Copps	Lisa Zaina
	Commissioner Kevin Martin	William Maher
	Commissioner Jonathan Adelstein	Carol Matthey
	John Rogovin	Michelle Carey
	Marsha MacBride	Jane Jackson
	Christopher Libertelli	Brent Olsen
	Matthew Brill	Harry Wingo
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**VIA HAND-DELIVERY**

March 24, 2003

Chairman Michael Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re Regulatory Parity and the *Wireline Broadband* Proceeding  
Ex Parte Presentation, CC Docket Nos. 02-33, 98-10, 95-20; 01-337

Dear Chairman Powell

EarthLink submits this letter to explain the legal obstacles to using "regulatory parity" as a basis for decision in the *Wireline Broadband* proceeding. As discussed below, judicial and Commission precedent are clear: achieving regulatory parity is not itself a valid legal basis for Commission action, including deregulation of Bell Operating Companies' ("BOC") advanced services. Simply put, the Commission risks reversible error in this proceeding if it eliminates Title II and *Computer Inquiry* safeguards on BOC services for the sake of the administrative (not statutory) goal of regulatory parity. Rather than seek to attain "parity," the Commission's decisions in this proceeding must rest squarely on whether a change to current access obligations achieves a net increase in consumer welfare.

As an initial matter, all sides in this proceeding would agree the Commission should tailor its decisions to the mandates of the Communications Act. However, a review of the Act demonstrates that the FCC has no statutory authority to set regulatory parity as its goal in this proceeding or to elevate it above the express goals set forth therein.<sup>1</sup> Legislative history of the

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<sup>1</sup> The assented "regulatory parity" objective in this proceeding on wireline broadband obligations would apparently only mean deregulation of the BOCs, i.e., a reduction of access obligations for incumbent LECs would tend toward a parity of regulation vis-a-vis the lack of regulation on cable modem service. See, *In the Matter of Appropriate Framework for Broadband Access to Internet over Wireline Facilities*, Notice of Proposed Rulemaking, CC Dkt. No. 02-33, FCC 02-42, ¶ 6 (rel. Feb. 15, 2002) (FCC "will strive to develop an analytical framework that is consistent, to the extent possible, across multiple platforms").

Letter to Chairman Powell

EarthLink *Ex Parte* (CC **Dkt.** No s 02-33: 98-10, 95-20; 01-337)

March 24, 2003

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Telecommunications Act of 1996 ("1996 Act") confirms this lack of statutory authority. In fact, the Senate version of the Act, as reported by the Senate Commerce Committee and as adopted by the Senate, contained a Section 305 entitled "Regulatory Parity."<sup>2</sup> Significantly, however, Congress ultimately decided to eliminate regulatory parity as a goal of the Act and rejected this portion of the legislation in the final bill approved by both houses of Congress and signed by then-President Clinton.

Neither has Congress implicitly endorsed regulatory parity as a goal of the Communications Act. Indeed, the structure of the Act imposes distinct obligations on providers even where competitive overlaps may occur.<sup>3</sup> In those few instances where Congress has set regulatory parity of competitors as a goal, it has done so explicitly and has imposed limits on the scope of decisions made for the sake of regulatory parity. Perhaps the best example is the enactment of Section 6002(d) of the 1993 OBRA (codified at footnote 1 of Section 332(c) of the Act) dealing with transitional regulation for mobile service providers, where Congress directed the FCC to establish "technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services."<sup>4</sup> Even there, however, Congress never directed the FCC to eliminate competitive safeguards in wireless services for the sake of regulatory parity, and the Commission refused to elevate the specific language of § 332 above its statutory mandate to foster consumer welfare. As the Commission explained in *McCaw/AT&T*<sup>5</sup> where BOCs argued that AT&T/McCaw should be subject to the same MFJ restrictions as the BOCs

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<sup>2</sup> S. 652, "Telecommunications Competition and Deregulation Act of 1995," § 305, as reported in S. Rep. No. 104-23. A copy of Section 305 is attached hereto.

<sup>3</sup> Compare 47 U.S.C. § 251(b) with § 251(c) (statute sets out additional regulatory requirements for incumbent LECs vis-a-vis competitive LECs), and § 153(26) (CMRS carriers are not to be regulated as "local exchange carriers" subject to Section 251(b) obligations absent FCC finding that they should be so treated); *Id.*, § 332(c)(8) (terrestrial and satellite mobile telephone carriers are not required to provide unblocked access to long-distance carriers unless the FCC determines that such a requirement would be in the public interest).

<sup>4</sup> 47 U.S.C. § 332(c) n.1 citing § 6002(d)(3)(B) of the Omnibus Budget Reconciliation Act of 1993.

<sup>5</sup> *In re Applications of Craig O. McCaw and AT&T*, Memorandum Opinion and Order, 9 FCC Rcd. 5836 (1994), *aff'd*, *SBC v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

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EarthLink *Ex Parte* (CC **Dkt** No s 02-33, 98-10, 95-20, 01-337)

March 24, 2003

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"we reject the proposal, and all others made by the BOCs, of parity ~~for~~ parity's sake the Communications Act does not require parity between competitors as a general principle "6

On reconsideration, while the BOCs relied upon the Section 332 regulatory parity language "to treat all cellular carriers uniformly," the FCC held that

"[d]espite joint petitioners' claims about regulatory parity: the Communications **Act** requires us to focus on competition that benefits the public interest: not on equalizing competition among competitors "7

As for the BOCs' Section 332 interpretation, the FCC pointed out that "Congress did not seek regulatory parity among different CMRS providers for parity's sake alone "8 Thus, no matter how strenuously the BOCs repeat the point; elimination of competitive safeguards for the sake of regulatory parity is not an objective of the Communications Act and, thus: of the Commission, even where Congress expressly calls for regulatory parity on certain discrete matters.

Courts agree with the FCC's consistent position that BOC arguments for deregulation in the name of regulatory parity among competitors are fundamentally inconsistent with the Communications Act.<sup>9</sup> For example: the Sixth Circuit rejected BOC arguments challenging the FCC's decision to impose a separate subsidiary requirement for BOC-affiliated wireless carriers but not for other large wireless carriers, stating

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<sup>6</sup> *Id.* at 5858

<sup>7</sup> Memorandum Opinion and Order on Reconsideration 10 FCC Rcd 11786, 11792-93 (1995)

<sup>8</sup> *Id.*, at 11795

<sup>9</sup> *GTE Midwest v. FCC*, 233 F.3d 341, 345 (6<sup>th</sup> Cir. 2000) (Court affirmed FCC decision to establish a separate subsidiary requirement for in-region incumbent LEC-affiliated commercial wireless carrier, finding that the FCC correctly based its decision on the BOCs' bottleneck control over wireline network and potential to engage in anticompetitive behavior despite the resulting lack of regulatory parity); *Melcher v. FCC* 134 F.3d 1343, 1149 (D.C. Cir. 1998) (Court upheld FCC decision to forbid incumbent LECs from acquiring LMDS licenses, despite lack of regulatory parity; because the FCC had adequately explained concern that incumbents would use the licenses for anticompetitive purposes)

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“[t]here is no specific indication that the Act sought to promote parity between AT&T and the Bell Companies. If Congress had sought to preclude the Commission’s ability to impose separate subsidiary requirements, it could have done so *explicitly*.”<sup>10</sup>

Since Congress chose not to pursue regulatory parity as a statutory goal of the Commission, reviewing courts will be skeptical, as they have been in the past, of FCC decisions that are effectively premised on an agency-established goal of regulatory parity. In the seminal case, *Hawaiian Telephone Co. v. FCC*, the D.C. Circuit made plain the hazards to the Commission of establishing regulatory parity as a goal for decisionmaking.

“Competition as a factor might have some relevance to the FCC decision, if competition had been shown to be of benefit to the public on the communications routes in question. Yet it is all too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the object of equalizing competition among competitors. *This is not the objective or role assigned by law to the Federal Communications Commission. As a result of focusing first on competitors, next on competition, and then on the public interest, the FCC . . . has not met its statutorily imposed duty*.”<sup>11</sup>

To be consistent with *Hawaiian Telephone Co.*, the Commission’s inquiry in the *Wireline Broadband* proceeding should not be whether incumbent LECs and cable operators are subject to identical regulation – they are not – but, rather, whether retention, modification, or elimination of ISP access rights under the Commission’s *Computer Inquiry* precedent would harm or advance the public interest.

More than twenty years ago, the D.C. Circuit explained in *Western Union Telegraph Co. v. FCC* that, while an incumbent provider may “object strongly to the Commission’s failure to equalize the regulatory burdens to which it and [a competitor] are subject”<sup>12</sup> and while the

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<sup>10</sup> *GTE Midwest Inc. v. FCC*, 233 F.3d at 347. Nor does an earlier appellate decision on this issue, *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6<sup>th</sup> Cir. 1995), support a general agency obligation of regulatory parity, as the BOCs may argue. Rather, the *Cincinnati Bell* court remanded the FCC’s disparate treatment towards BOCs because the agency had failed to provide a rational explanation for not eliminating the separate subsidiary obligation. On remand, the agency did provide a reasoned explanation on the record, and the Sixth Circuit in *GTE Midwest* then affirmed the FCC’s decision.

<sup>11</sup> *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 775-776 (D.C. Cir. 1974) (emphasis added).

<sup>12</sup> *Western Union Telegraph Co. v. FCC*, 665 F.2d 1112, 1118 (D.C. Cir. 1981).

Letter to Chairman Powell

EarthLink *Ex Parte* (CC Dkt. No s 02-33, 98-10, 95-20; 01-337)

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incumbent may argue that the FCC's actions demand "reversal until regulatory parity is achieved,"<sup>13</sup> these arguments are "without merit."<sup>14</sup> As the court explained,

"[E]qualization of competition is not in itself a sufficient basis for Commission action. Instead, as the Commission recognized, it must evaluate that action in terms of the public benefits, as provided by *Hawaiian Telephone Co. v. FCC* . . . *The Commission was necessarily obliged to consider other interests, however, particularly the public's, and we cannot require their disregard for the sake of immediate regulatory parity.*"<sup>15</sup>

More recently, in *SBC Communications Inc. v. FCC*, the court reiterated that "[t]he Commission is not at liberty to subordinate the public interest to a desire to 'equaliz[e] competition among competitors'"<sup>16</sup>

The Communications Act charges the FCC with rulemaking authority not so that it may tinker with the market shares of cable versus incumbent LEC platforms, but rather so it may promulgate regulations that further the public interest. In EarthLink's view, the record of this proceeding demonstrates that the *Computer Inquiry* access obligations continue to serve a vital role for consumers. While it would be impracticable to repeat all the evidence here, the record shows that ISPs offer a variety of functionalities and services that consumers value, and that although the incumbent LECs' ISPs can participate fully in the market, they cannot possibly match the enormous variety of competing offerings, including price and customer service packages, available in the ISP marketplace today. Furthermore, the presence of cable does not significantly alter the public interest calculus because there are no access requirements on the vast majority of cable systems today. In other words, without the incumbent LEC's platform, consumers have limited or no choices among broadband ISP services and prices, and so the *Computer Inquiry* obligations hold as much public importance today as they did when the Commission repeatedly affirmed them over the past decades."

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<sup>13</sup> *Id.*, at 1120

<sup>14</sup> *Id.*, at 1121

<sup>15</sup> *Id.*, at 1122 (emphasis added)

<sup>16</sup> *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (citing *Hawaiian Telephone*, 498 F.2d at 776)

<sup>17</sup> In fact, just four years ago, the Commission again stressed the importance of these obligations. *In the Matter of Computer III Further Remand Proceedings, Report and Order*, 14 FCC Rcd. 4289, ¶ 11 (1999) ("We believe that: in today's telecommunications market, compliance with the Commission's CEI requirements remains conducive to the operation of a fair and competitive market for information services"); *id.* at ¶ 16 ("We disagree with SBC and BellSouth that CEI (footnote continued on next page)

■ Lampert & O'Connor, P.C.

Letter to Chairman Powell

EarthLink *Ex Parte* (CC Dkt. No s 02-33, 98-10, 95-20: 01-337)

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Finally, there is no legitimate concern in this proceeding that incumbent LECs have a constitutional claim to regulatory parity; as some BOCs have intimated. Disparate regulation does not raise equal protection or due process concerns unless the FCC's actions are arbitrary or fail *to* show a rational basis.<sup>18</sup> Any heightened constitutional scrutiny would be unwarranted in this proceeding because BOCs are not a constitutionally "suspect class." The FCC's disparate regulatory treatment would be subject to the least restrictive, rational basis review.<sup>19</sup> Similarly, no First Amendment issues arise, because Title II and the *Computer Inquiry* rules are content-neutral obligations directed at the BOCs' bottleneck *control* over common carrier access facilities and have no impact on the BOCs' information services: editorial controls, or speech.<sup>20</sup> Indeed, these obligations are indistinguishable from other access obligations of common carriers promulgated by the Congress, the Commission, and the States and should face no special constitutional scrutiny.

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(footnote continued from previous page)

and other safeguards are surrogates for competition, and because there are so many competitive ISPs, such surrogates are no longer needed. Based on these circumstances, we do not believe that our progress in implementing the 1996 Act has reduced the threat of discrimination sufficiently to warrant removal of any of these additional safeguards at this time.") *recon.*, Order, 14 FCC Rcd. 21628 (2001)

<sup>18</sup> *Cincinnati Bell v. FCC* 69 F. 3d 752, 765 (6<sup>th</sup> Cir. 1995) (court declined to overturn FCC decision, finding a rational basis for disparate treatment of SMR and cellular providers).

<sup>19</sup> *BellSouth v. FCC*, 162 F. 3d 678, 691 (D.C. Cir. 1998) ("The differential treatment of the BOCs and non-BOCs is neither suggestive of punitive purpose nor particularly suspicious. Accordingly, we need only subject Section 271 to rational basis scrutiny" (citation omitted))

<sup>20</sup> *Leathers v. Medlock*, 499 U.S. 439, 449-450 (1991) (finding no precedential support for claim that First Amendment issue arises where the government engages in "intermedia and intramedia discrimination" where there is an "absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas")

.  **Lampert & O'Connor, P.C.**

Letter to Chairman Powell

EarthLink *Ex Parte* (CC Dkt. No s 02-33; 98-10, 95-20; 01-337)

March 24, 2003

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EarthLink looks forward to the opportunity to discuss these issues with you and to discuss further why the balance of public interest concerns weighs in favor of continuing the rules for consumer access to ISPs via the incumbent LEC broadband networks. In accordance with the Commission's *ex parte* rules, an original and eight copies of this letter have been provided to the Commission Secretary for inclusion in the above-referenced dockets.

Sincerely,



Mark J. O'Connor

Kenneth R. Bole

Counsel for EarthLink, Inc.

CC Commissioner Kathleen Abernathy  
Commissioner Michael Copps  
Commissioner Kevin Manin  
Commissioner Jonathan Adelstein  
**John** Rogovin  
Marsha MacBride  
Christopher Libenelli  
Matthew Brill  
Jessica Rosenworcel  
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Daniel Gonzalez  
Lisa Zaina  
William Maher  
Carol Matthey  
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Harry Wingo  
Cathy Carpino

Enclosure

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## S.652

### Telecommunications Competition and Deregulation Act of 1995 (Reported in Senate)

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#### SEC. 305. REGULATORY PARITY.

Within 3 years after the date of enactment of this Act, and periodically thereafter, the Commission shall-

- (1) issue such *modifications or terminations* of the regulations applicable *to* persons offering telecommunications or information services under title II, III, or VI of the Communications Act of 1934 as are necessary to implement the changes in such Act made by this Act;
- (2) in the regulations that apply to integrated telecommunications service providers, *take into account* the unique and disparate histories associated with the development and relative market power of such providers, making such modifications and adjustments as are necessary in the regulation of such providers as are appropriate to enhance competition between such providers in light of that history; and
- (3) provide for periodic reconsideration of any modifications or terminations made *to* such regulations, with the goal of applying *the same set of* regulatory requirements to all integrated telecommunications service providers, regardless of which particular telecommunications or information service may have been each provider's original line of business